United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

ORIGINAL

76-4021

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ROMAN CATHOLIC DIOCESE OF BROOKLYN AND ST. LEO'S PARISH, AS JOINT OPERATORS OF ST. LEO'S SCHOOL,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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P/S

BRIEF OF RESPONDENTS ROMAN CATHOLIC DIOCESE OF BROOKLYN AND ST. LEO'S PARISH

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BRIEF OF RESPONDENTS ROMAN CATHOLIC DIOCESE OF BROOKLYN AND ST. LEO'S PARISH

Counterstatement of the Facts

A. St. Leo's School Operates Autonomously from Respondent Roman Catholic Diocese of Brooklyn.

Respondent St. Leo's Parish, which owns and operates St. Leo's School, is incorporated under the religious cor-

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[1] Respondents have no objection to the Statement of Issues nor to the Statement of the Case set forth in the Brief of Petitioner National Labor Relations Board (the "Board"). The Board adopted the Administrative Law Judge's findings, and the Counterstatement of the Facts set forth herein similarly accepts those findings, but supplements them in certain respects. "A" references are to the portions of the record printed in the appendix. The Administrative Law Judge's findings are to be found on pages A. 2-A19, and the decision by the Board on pages A.23-A.25.

poration laws of the State of New York, separate and apart from the Roman Catholic Diocese of Brooklyn (the "Diocese") (A. 34, 54). St. Leo's Parish is independently financed by the donations of its parishioners; it is not subsidized in any way by the Diocese (A. 60).

The parishes are units of the Diocese whose number and geographic boundaries are determined by the Diocese (A. 3). The administrative head of each Parish is a Pastor, also called a Rector, who is appointed by a Diocese Personnel Board (A. 3).

St. Leo's School of St. Leo's Parish (the "School") is one of the 185-190 Parish operated primary schools in the Diocese of Brooklyn (A. 3). Each Parish School is run by a principal appointed by the religious order affiliated with the particular school (A. 36, 57). In the case of St. Leo's, the Principal is Sister Mary Denis, and the order is the Gray Nuns of the Sacred Heart whose headquarters is located at Yardsley, Pennsylvania (A. 57-58). The Gray Nuns have no connection with the Catholic Schools Office of the Diocese; they are not under the control of the Bishop of Brooklyn and have teaching operations throughout the United States (A. 57-58, 195-96).

The School's faculty consists of the Principal, 5 teaching nuns and 12 lay teachers (A. 3, 4, 5, 60, 77). The School budget (Respondent's Exhibit No. 4, A. 287-89) is developed by the Principal and the Pastor (A. 60-61). The amount of tuition charged by St. Leo's is determined by the Principal and the Pastor and St. Leo's Parish Council (A. 60-61). The Diocese has no say in the amount of tuition charged (A. 60-61). St. Leo's Parish and not the Diocese pays for the costs of the School that are not covered by tuition payments or federal grants (A. 287-89).

The Diocese maintains a Catholic Schools office to provide various services to Catholic parochial schools within the Diocese; both the parish elementary schools and 35 high schools (A. 29). That office recruits applica-

tions of prospective teachers and maintains them in its files (A. 3). When an opening occurs at a parish school, the principal will request applications from the Catholic Schools Office and from 3 to 5 applications would be forwarded to the Principal. The Principal, however, of the particular school would interview the applicant and have sole discretion, along with the Pastor, as to the hiring of the applicant (A. 53). Parish elementary schools need not seek applicants for teaching positions through the Schools Office but can hire teachers directly (A. 52). Two of the 12 teachers at the School were hired directly by St. Leo's (A. 115-16, 125) although they were interviewed later by the Catholic Schools office where their forms were completed (A. 3-4).

There are no interschool transfers of teachers between parish schools as that term is generally used (A. 49). If a teacher wishes to be employed at another school in the Diocese he must first apply to the new school for employment. If an opening exists, the teacher would be interviewed, and if accepted, it would be at the sole discretion of the new school, provided no outstanding employment contract existed for work at the former school (A. 48-49). Thus, there is a resignation of employment at the old school and acceptance of new employment at the new (A. 59-60).

Contracts of employment are entered into between the teacher and the particular parish on a form provided by the Catholic Schools office (A. 4). The agreement provides that the teacher be paid according to the Diocesan Salary Schedule and that they agree "to observe and enforce the rules prescribed by the Pastor and Principal and the regulations of the Brooklyn Diocesan Schools Office . . ." (A. 4). The pay scale is not binding upon individual parishes—some parishes pay less and some pay more than the recommended pay scale (A. 57).

St. Leo's Parish pays the salaries of its teachers, and pays for the full cost of their extensive fringe benefits (A. 4). The decision whether or not to provide any particular benefit, such as pension, medical or life insurance, is solely up to the Parish (A. 41), and the Diocese merely functions as a "bulk" purchaser to get lower costs (A. 212-13). The School also applies directly for, and receives directly federal aid under Titles I, II and VII of the Federal law on aid to education (A. 195).

The School develops its own curriculum in accordance with state regulations and guidelines (A. 55). The direction and supervision of the teachers at a parish school rests solely with the Principal and Pastor of the School (A. 53-54). Teachers are disciplined and terminated at the sole discretion of the Principal and Pastor (A. 48-49, 54). Teachers are evaluated solely by the Principal of the elementary school where they are employed—the Diocese plays no role in this function (A. 54). Similarly, the performance of the work of the Principal is not evaluated by the Diocese but by the Community Supervisor of Schools of the Gray Nuns of the Sacret Heart which has responsibility for supervising education at St. Leo's (A. 195-96). There is no relationship between the Community Supervisor of the Gray Nuns and the Catholic Schools Office (A. 58).

The Catholic Schools' office prepares a Personnel Handbook for elementary schools which is distributed to all schools. This handbook contains a set of recommended personnel procedures which, while followed by the School in most respects, are not binding on the School (A. 37-39, 56-57, 80). The Principal may or may not seek advice on personnel matters from the Diocese, and during the course of a school year, possibly one-half of the elementary schools in the Diocese do not have any dealings with the Catholic Schools Office (A. 61). The most active area of

the Catholic Schools Office is the instructional department which provides resources to improve the quality of teaching. The resources are provided upon request from the parish school (A. 54-55).

The following "areas of collaboration" also exist between the Diocese and the parish schools, including St. Leo's:

> "The diocese prepares and distributes elementary school calendars setting forth official and religious holidays; although job evaluations are conducted at the parish school level, copies of the evaluations are submitted to the Diocese Schools' office where they are retained in the teacher's personnel files, textbooks selected by the teachers are taken up with the Diocese Schools office for approval prior to being ordered; and the financial data of the individual parish schools are included in the Diocesan Financial Report, which is published and publicly circulated by the Diocese (A. 5)."

B. The Demand for Recognition and the Response Thereto by the School.

In early 1974, nine of the lay teachers at the School discussed among themselves the idea of union representation (A. 90-91). At the conclusion of a meeting it was determined that there was insufficient support for a union, and the meeting was "a fiasco" (A. 121). During subsequent months Mr. Dennis Farrel, a lay teacher at the School, became the union "delegate" (A. 98). He received mail at the school from Lay Faculty Association, Local 1261 (the "Union") which came in an envelope with the letterhead stamped "Lay Faculty Association" (A. 91). This mail was distributed by the Principal, Sr. Denis, to each teacher's individual mail box in accordance with the customary practice at the School (A. 92). At Farrel's yearly evaluation in June 1974, Sr. Denis advised Farrel

that she was aware that there had been a meeting about bringing in an outside organization, and that he had received mail at the School from the Union, since she herself had put it in his mail box (A. 92).

In October 1974, at the beginning of the new school year, a number of teachers once again discussed the possibility of bringing in the union (A. 92), a meeting was held with a representative of the union, and representation cards were filled out by 8 lay teachers (A. 7), two of whom later sought the return of their cards (A. 162, 182).

On November 27, 1974, the Wednesday before Thanksgiving, Sr. Denis received the Union demand letter for recognition (A. 281). The letter, addressed to her as Principal of the School, claimed that a majority of the lay teachers "at your school" had designated the Union as their collective bargaining representative and requested recognition (A. 281). The letter took Sr. Denis by surprise since after the aborted interest in exploring the possibility of union representation in the prior school year, she was unaware of any interest by the lay teachers in such representation (A. 189). No response was given to the demand at that time in view of the forthcoming holiday and her lack of awareness of the sentiment of the teachers at the School.

After classes on Monday, December 2, the first school day following the Thanksgiving recess, Sr. Denis went to a scheduled faculty meeting with the 5th and 6th grade teachers (A. 180). At the meeting, she was told that there had been a "blowout" at the faculty room at lunch that day over the fact that not all of the teachers had been advised of the approach to the union (A. 181, 224-25). One of the teachers told Sr. Denis that she too was extremely upset about the union, wanted nothing to do with it, and asked Sr. Denis if she had the address of the union so that she could write and get her "card or letter, or whatever it was back" (A. 182).

Subsequently, on December 3rd, Sr. Denis responded to the union's demand for recognition stating that although the union claimed to represent the majority of the teachers, she "did not believe that a majority of my teachers wish to be represented by your organization" (A. 282). On the same day, after classes, Sr. Denis had a meeting with Farrel, who she was aware was the union delegate in the school. She asked another teacher to be present so her remarks would not be taken out of context or misinterpreted (A. 7-8).

The meeting with Farrel was of a short duration, possibly as little as 5 minutes and Sr. Denis did most of the talking (A. 8). She stated that she was aware that teachers had gotten together and were interested in having an "outside organization" come into the school, that she believed that it would be detrimental to the school and divisive of the faculty, and that she would do everything "within the law" to prevent the outside organization from coming into the school (A. 8). After explaining the various benefits enjoyed by the teachers, including salary raises, she added that she "couldn't understand anything that an outside organization could give that they already didn't have" (A. 8).

In dispute is whether any coercive statements were made, particularly the nature of remarks about the possible closing of the School (A. 8).

On direct testimony, Sr. Denis testified that when she asked Farrel what an outside organization could offer, he responded "job security" and that is when

> "I mentioned that there would be no job security if the schools weren't open and operating. There would be job security only if they were open and operating. I said that an outside organization would not guarantee that they would have this job security" (A. 9; 186).

On cross-examination, she stated that in response to Farrel's mention of additional monies

> "I said something to the effect that if there were too many demands from an outside organization upon the school and the school couldn't meet these demands, that possibly the school would have to close. Schools I think. I don't even think I put it in singular. Schools would have to close" (A. 9; 209).

She continued and stated

> "he also moved on to say about job security and I said at that time that I felt jobs are only secure when the schools are open and operating. That an outside organization really couldn't give them job security if the schools weren't open and operating." (A. 209).

Farrel, testifying on behalf of General Counsel, differed in his recollection as to what Sr. Denis' response had been to his question regarding job security. He stated, conceding that he was not sure of the exact words that she had said:

> "something like what do you expect to get from this outside organization and I said that I wanted some job security and Sister said there could be no job security because if the outside organization came into the school, the school would close and I said I wanted a tenure system and she went on to talk about dedication to the job and that we should be teaching for Christ and if I wanted more money I should go elsewhere." (A. 8-9)

Farrel testified that several times Sr. Denis had stated she did not want this outside organization in the school, that she mentioned Catholic high schools and stated that "several high schools had closed since—I think the number that was said was 4—4 Diocesan high schools are closed

since the union was put into the high schools" (A. 9). He also stated that during the meeting, Sr. Denis had advised him that he had "excellent potential for leadership, but that he was moving in the wrong direction and was hurting his chances" (A. 10).

The third party present at this meeting testified that when Farrel had raised the question of job security "Sr. said we have job security, as long as the school is open we have job security" (A. 220). That witness had also signed an affidavit for the Board agent which stated "I believe Sister Denis said something to the extent that if more money were asked by an outside organization, and the parishes could not meet it, the schools would be forced to close. (I don't know if Sr. Denis was referring to St. Leo's schools or other Catholic schools in general)" (A. 223).[2]

On the following day, December 4, 1974, a regular faculty meeting was scheduled from 12 to 1 at which Sr. Denis discussed a number of school matters (A. 10). At the end of the meeting she reiterated her position with respect to the union. She noted that some of the teachers were trying to bring an outside organization into the school and that she would "do all within the law to prevent an outside organization coming into the school because I believe it is very detrimental to St. Leo's School insofar as it is divisive of the faculty" (A. 10; 191).

There was a conflict in the testimony as to the nature of her remarks about the possibility of the school closing as a result of the outside organization. Two witnesses, Farrel and Annette Di Rocco testified that Sr. Denis stated that if job security is what the teachers wanted, and if an outside organization was brought into the school, the school would

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[2] The Administrative Law Judge's summary of the witness' testimony failed to include a reference to this testimony (A. 10, n. 8).

not be able to meet the demand of the outside organization and that the school would close. Another teacher testified that she recalled Sr. Denis stating "that if we took part in union activity, the school would close" (A. 10-11).

Other teachers present at the meeting testified that they did not recollect hearing anything about the closing of the School, or that any remark about such closing was in the context that there cannot be job security unless the schools are open (A. 11).

The Administrative Law Judge also found that during this meeting Sr. Denis, addressing her remarks to 3 new teachers, stated that if an outside organization was brought into the school, the last teacher hired would be the first one to be fired (A. 12).

The Decision Below

Without particularizing, the Administrative Law Judge concluded that:

> "From all of the foregoing it is clear that the Roman Catholic Diocese of Brooklyn maintains a significant degree of control over the schools, including the terms and conditions of employment of teachers, and that it represents itself, with the parish schools, including Respondent St. Leo's, as an integrated enterprise." (A. 5)

Since Respondents were deemed to be joint employers, the Board's jurisdictional standards were satisfied (A. 6).

He also credited the testimony of Farrel with respect to both his meeting with Sr. Denis on December 3rd, and the faculty meeting on the following day (A. 10-12). Accordingly, he concluded that Sr. Denis had, at both meetings, unlawfully threatened to close the school if the union was

selected as bargaining representative; had threatened Farrel, the leading employee union adherent that he would be hurting his chances for advancement if he persisted in his union activities; and had interrogated Farrel by asking what he would expect to obtain from the outside organization (A. 13-14).

No other violations were found either before or after the meetings (A. 13). A bargaining order was nevertheless found warranted since Respondents' unlawful conduct "precluded the holding of a fair election" (A. 16).

The Board affirmed the findings and conclusions and noted an additional reason warranting the bargaining order. It stated that the Respondents unlawfully refused to recognize and bargain with the union on the grounds that the union did not represent the majority when the record showed that 8 out of 12 employees had signed authorization charts. By refusing to recognize the union and by "embarking instead upon a course of unfair labor practices designed to destroy the union's majority status and preclude the holding of a fair election, Respondents violated Section 8(a)(1) of the Act" (A. 23-24).

POINT I

Substantial evidence on the record as a whole fails to establish that the Diocese is a joint employer since the Diocese has no control over the labor relations or working conditions of the lay teachers at St. Leo's School. The record most favorable to General Counsel merely establishes that there are "areas of collaboration" between St. Leo's and the Diocese.

The Diocese is named as a Respondent, although not a single act is attributed to it, to satisfy the Board's jurisdictional standard since it is conceded that if St. Leo's was the sole Respondent the charges would be dismissed

on jurisdictional grounds (A. 2-3).[3] The fact that there are "areas of collaboration" does not establish a joint employership when as here, there is no control or direction over labor relations. The conclusion that the Diocese is a joint employer with St. Leo's is contrary to established Board and Court precedent and not supported by substantial evidence on the record as a whole.

In determining whether or not several entities may be considered a single employer for jurisdictional purposes, the Board has held that the issue is whether the enterprises are sufficiently integrated with respect to ownership and operation to so treat them. Some of the principle factors which the Board has relied upon in determining the extent of this integration are:

1. Interrelations of operations;

2. Centralized control of labor relations;

3. Common management; and

4. Common ownership or financial control.

See Local Union 1264 v. *Broadcasting Service of Mobile, Inc.*, 380 U.S. 255 (1965).

While none of these factors has been held to be determinative, the most crucial and significant factor is the extent of control of labor relations.[4] It is not sufficient

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[3] Significantly the union's demand for recognition was addressed solely to Sr. Denis with respect to the teachers "at your school" (A. 281).

[4] In Gerace Construction Inc., 193 NLRB No. 91, 78 LRRM 1367 (1971), the Board stated:

> "A critical factor in determining whether separate legal entities operate as a single employing enterprise is the degree of common control of labor relations policies. Thus, the Board has found common ownership not determinative where requisite common control was not shown and the Board has held with court approval that such common control must be actual or active, as distinguished from potential control." (78 LRRM at 1368).

that there be "areas of collaboration", as the Administrative Law Judge implied. Rather, there must be a showing that the alleged joint employer exercises or has the power to exercise authority over the employees in question. In other cases, where collaboration was found, but with no control over the employees, no joint employer status was found.

In *Buffalo General Hospital*, 218 NLRB No. 167, 89 LRRM 1627, an employer subject to the Act entered into contract, to supply certain services, with a County, which was not subject to the Act. A question arose as to whether the contract gave the County such control over the employer's operations and labor relations so as to make them joint employers. In finding it did not, the Board concluded that the independence of the employer's enterprise and its control over labor relations were never materially affected by any of the terms of the contract between the employer and the County.

Directly on point is the decision in *Jewish Hospital of Cincinnati*, 223 NLRB No. 91, 91 LRRM 1499 (1976) in which the issue was whether the hospital was a joint employer of employees at the fountain and gift shop in the hospital which was operated by an independent Auxiliary. These employees were recruited and screened by the hospital personnel office which maintained their personnel records; they underwent the same orientation as hospital employees; they were required to have the same physical examination and security check as hospital employees; used the same time-in devices; wore the regular hospital identification badge; enjoyed the same cafeteria and parking privilege as hospital employees, and the Auxiliary tried to provide them with the same fringe benefits as received by hospital employees (91 LRRM at 1505). The Auxiliary, however, established its own policies of wages, promotions, discipline, etc. Notwithstanding the fact that "a number of aspects of the relationship which suggests" a joint em-

ployership, the Board declined to find such a relationship since the Auxiliary "independently and autonomously determines wages and terms and conditions of employment" for the employees (91 LRRM at 1506).

In the instant case the degree of autonomy exercised by St. Leo's is substantially greater than that exercised by the Auxiliary in the *Jewish Hospital* case. It operates as a separate institution, in its own building, has complete control over its employees, and delegates none of the indicia of control to the Diocese.

Similarly, in *N.L.R.B.* v. *Welcome-American Fertilizer Co.*, 443 F.2d 19 (7th Cir. 1971), one employer standing alone would not have satisfied the Board's jurisdictional guidelines and the Board found a joint employer status between a parent and a subsidiary. The Court noted that the parent had no power to control or influence the subsidiary's labor relations nor was there an interchange of employees. Thus, the Court concluded that the record did not satisfy the Board's own test as to whether there was sufficient integration to treat separate concerns as a single employer.

Here on every aspect on the control of the labor relations of the employees there is complete autonomy by the School. The Diocese has no authority over such matters as the day to day administration at the School, the selection of the Principal, the control of the curriculum and the employment and supervision of the teachers. The salaries and fringe benefits of the teachers are solely within the discretion of the School. There is no interschool transfer between teachers at St. Leo's and other parish schools.

The record as a whole thus fails to show that there is any significant degree of control by the Diocese over the employees. Nor is there the slightest proof that the Diocese represents itself as an integrated enterprise with St. Leo's School since the record demonstrates that they act independently of each other.

Neither the cases relied upon in the decision below, nor those in Petitioner's brief support the conclusion that a joint employership exists between the Diocese and St. Leo's.

The primary case relied upon by the Administrative Law Judge was the *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 NLRB No. 54, 88 LRRM 1169, where the Board asserted jurisdiction over five high schools located within the Archidocese of Baltimore on the basis that there was a joint employer relationship existing between the Diocese and the high schools. An analysis of that decision shows that the circumstances were fundamentally different from those in the present case.

First, the Archdiocese of Baltimore owned the land and the buildings on which the high schools were located, was responsible for capital improvements, and in the past had directly subsidized the five schools as well as provided tuition grants to individual pupils. In contrast, in the case of St. Leo's, the land and building of the school are owned by the parish, the parish has the sole responsibility for the capital improvements, and the parish and school are not subsidized in any way by the Diocese either through direct subsidies or pupil tuition grants (A. 54-55).

Second, the Board noted that the Archdiocese of Baltimore had maintained a relationship since 1966 with the petitioning union and had negotiated with it over such matters as wage scales and the individual teacher contracts at four of the five schools. No such bargaining relationship has ever existed with respect to St. Leo's School.

Third, the decision pointed out that the teachers' contract published in the personnel handbook listed the Archdiocese, the Superintendent of Schools and the School Principal as parties. The contract between St. Leo's School and the teachers at St. Leo's does not include the Diocese or the Superintendent of the Schools, but only the parish and the individual teacher (A. 53, 260).

Fourth, the amount of tuition was subject to the approval of the Archdiocese. In the case of St. Leo's, as in the case of other Brooklyn Diocese elementary schools, the amount of tuition is not subject to the approval of the Diocese (A. 60-61).

Fifth, in at least one instance the Archdiocese of Baltimore's Superintendent of Schools was identified to the State of Maryland as the individual vested with ultimate authority for governing and operating at least one of the five high schools. Again no such representation has been made to the State of New York in the case of St. Leo's School. Arrangements for federal aid grants under various sections of the law are applied for directly by the principal of St. Leo's and such funds are paid directly to St. Leo's (A. 195).

Thus, the decision not only fails to support the General Counsel's position but fully supports the position of Respondents that no joint employer relationship exists between them for none of the elements of control present in the Baltimore case exist here.

Also cited below were three decisions involving the "Henry M. Hald School Association"—*Henry M. Hald High School Association and Roman Catholic Diocese of Brooklyn*, 216 NLRB No. 94; *Henry M. Hald High School Association, Roman Catholic Diocese of Brooklyn and the Sisters of Saint Joseph*, 216 NLRB No. 93; and *Henry M. Hald High School Association and the Sisters of Saint Joseph*, 213 NLRB No. 15. In those decisions, the Board held that the Hald Association was the alter ego of the Diocese of Brooklyn and thus they were joint employers. Presumably, the Administrative Law Judge has taken the position that the same relationship exists between St. Leo's School and the Diocese of Brooklyn. However, as an examination of the facts of those decisions shows, nothing could be further from the truth.

The Henry M. Hald High School Association, the "alter ego" of the Diocese, operated a group of five Diocesan high schools that had been built with Diocese funds and owned and operated directly by the Diocese. Teachers hired by the Hald Association must be approved by the Diocesan Schools Office and that Office controlled their budgets and operations (A. 62-63). In addition there were religious community high schools in the Diocese which are high schools operated by religious orders. The relationship of the Diocesan Schools Office to those community religious high schools is "very close" to the relationship between that office and the elementary Parish schools (A. 63).

In another *Hald Association* case (*The Sisters of St. Joseph*), 213 NLRB No. 54, 87 LRRM 1403 (not cited below) a distinction was made between the community religious high school and the Hald high schools. Thus, while a joint employer relationship exists between each of the Hald school and the Diocese, *no such* relationship existed between the religious community high schools and the Diocese.

The critical distinctions in the operations of the two types of schools were as follows:

The religious community schools:	*The Hald high schools:*
Are administered and operated by religious orders or congregations (p. 10);[5]	Are under the direct control and administration of the Bishop (p. 10);
The Principal exercises final control over the hiring and firing of teachers (p. 10);	Authority [over the hiring and firing of teachers] ultimately lay with the [Diocesan] Superintendent of Schools (p. 10);
The Principal is subject to the sufferance of the religious community (p. 10);	
The Principal's immediate superior would be the religious community (p. 10);	The principal's superior was the Superintendent of the Brooklyn Diocese schools (p. 10);

[5] References are to the mimeographed decision of Administrative Law Judge Lowell Goerlich, JD—699-73, issued November 29, 1973.

The religious community schools:	*The Hald high schools:*
The Diocese does not dictate curriculum (p. 11);	Policies such as admission, budget, hiring and so forth were under the direct control of the Diocesan Superintendent (p. 10).
The Bishop could not tell superior would be the re- the School to close (p. 11).	

Based upon the above significant distinctions, Judge Georlich found that:

> "The independence exercised by the Sisters in school operational matters at [religious community high schools] is enough to obviate the operation of the doctrine of alter ego . . . ." (p. 12).

St. Leo's School has the identical relationship to the Diocese as did the non-Hald high schools in the above *Hald* case. Thus, as shown *supra*, at St. Leo's:

> —authority over the hiring and firing of teachers rests solely with the principal and pastor;
>
> —the principal's superior in educational matters is the community supervisor of her religious order;
>
> —policies such as admission, hiring, budget, are under the sole control of the principal and pastor of St. Leo's;
>
> —the choice of the curriculum is made by the principal and pastor of St. Leo's subject to state regulations. St. Leo's School is administered and operated under the supervision of the religious community.

All the significant aspects of operation of the School are identical to those of the religious community high schools which were found by the Board not to establish a relationship of alter ego or joint employership. Thus the *Honey Hald* cases not only do not support the decision below, but are completely contrary to it.

Cases relied upon by Petitioner in its brief are also completely inapposite. In each the second employer had con-

trol over and direction of the labor relations of the first employer. Thus in *N.L.R.B.* v. *Checker Cab Company*, 367 F.2d 692 (6th Cir. 1966), the Board had found that a group of employers had banded themselves together so as to set us "joint machinery for hiring employees, for establishing working rules for employees, for giving operating instructions to employees, for disciplining employees for violations of rules, for disciplining employees for violations of safety regulations" (Id. at 698). Under these circumstances it was obvious that there were "'sufficient indicia of control' to warrant the joint employer finding of the Board" (Ibid). Here there were no such indicia of control. While it is true that the Catholic School's office maintained a personnel office at which central records were kept, it was the School that actually hired the employee, supervised the employee, and was in direct control over the employee on a day-to-day basis.

Similarly, in *Ace-Alkire Freight Lines, Inc.* v. *N.L.R.B.*, 431 F.2d 280 (8th Cir. 1970) the Board found that both employers "shared in the hiring process and both exercised control over the manner in which the men performed their duty" (Id. at 282). Thus the second employer exercised the right to discharge unsatisfactory employees, dispatched the drivers and omnitored various logs prepared by them. In the instant case, as noted above, there is no such active intervention on the part of the Diocese with respect to the supervision and control of the lay faculty at St. Leo's.

The record here establishes the autonomy of operation by St. Leo's. The elements relied upon by petitioner are identical to those that would exist in any parent-subsidiary relations. However, that in and of itself does not establish joint employership. (*N.L.R.B.* v. *Welcome Amer. Fertilizer Co., supra*). Similarly in the area of employment and working conditions, there is no control by the Diocese. Rather, it merely provides a centralized recruitment and personnel office.

The authority to hire and fire, and the actual supervision of the employees is that of St. Leo's and St. Leo's alone. In view of the absence of the slightest degree of control by the Diocese over these areas, the determination that a joint employership relation exists lacks support in the record.[6] Nor do any of the decisions relied upon support this conclusion. Accordingly, since the School does not meet the Board's jurisdictional standards by itself, the case should be dismissed, and the petition for enforcement denied.

POINT II

Comments about the possible closing of the School were in the exercise of the rights protected by Section 8(c) of the Act.

The bargaining order is premised on the alleged unlawful threats and interrogation by Sr. Denis in her conference with Farrel on December 3, particularly the remarks concerning possible closing of the school, the latter remarks allegedly being repeated at the faculty meeting the following day. The Board also held that the failure to recognize the union on and after December 3, 1974 at a time when 8 of the 12 employees had signed authorization cards, was violative of the Act warranting the issuance of a bargaining order. The record as a whole, however, fails to

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[6] Certain arguments raised in Petitioner's brief are irrelevant to the issue posed. It asserts that the record does not suggest any disagreement between the Diocese and St. Leo's concerning the labor relations policies that were adopted by Sr. Denis (p. 13). Certainly there was no burden upon the Diocese to in any way claim that it disagreed with Sr. Denis' policies since at no point did she contact the Diocese and ask for its advice. Nor in fact, would it have any authority with respect to such matter. In the same vein, Petitioner's reference to the fact that the same attorney represented both the Diocese and St. Leo's is a startling basis to support joint employership.

establish that the refusal to recognize the union, and the subsequent acts and remarks of Sr. Denis were violative of the Act.

A. The rejection of the union's demand for recognition on December 3, 1974 was consistent with Board precedent and in and of itself cannot be the basis of a bargaining order.

On November 27, 1974 Sr. Denis received a demand for recognition from the union. On the next school day, before she had finalized her response to this demand, she learned that the matter of union representation had led to a "blow-up" in the faculty lunchroom that day, that a number of the teachers were upset over the attempt to bring in the union, and at least one, if not more, who had signed representation cards were seeking to get them back. Given this information and the knowledge she had that in the prior year a similar attempt to obtain union representation had been a "fiasco", Sr. Denis' response was to reject the demand for recognition and require the union to prove its majority status in an election. In *Linden Lumber Division* v. *N.L.R.B.*, 419 U.S. 301 (1974) the Supreme Court held that an employer is not guilty of an unfair labor practice solely on the basis of its refusal to accept evidence of majority status other than by the results of a Board election. Thus, regardless of the number of cards presented to an employer (and here none were actually presented) or other proof of majority status, an employer may refuse to recognize a union until the employees have expressed their preferences in an election.

Here on December 3, 1974, when Sr. Denis rejected the union's demand for recognition, all that had been presented was an unsupported letter asserting majority status. Yet Sr. Denis had good reason to believe that this claim was of dubious validity, since some who had signed cards were desirous of getting them back. No allegedly illegal conduct

had taken place. Thus, a bargaining order is warranted only if there was subsequent conduct of such a nature that the employees should be deprived of their right to vote on the question of union representation, and the employer forced to bargain with a union which does not in fact represent nor did it ever truly represent a majority of the employees.

B. Comments about possible closing of the school were in the nature of economic arguments and not threats of reprisal.

The unfair labor practices allegedly committed by respondents that were "so substantial as to preclude the holding of a fair election" (A. 23), in reality are isolated remarks by Sr. Denis. These statements were made without consulting counsel (A. 183) and were spontaneously given at two meetings held within a time span of 24 hours. Neither prior, nor subsequent to these meetings was there any other alleged illegal conduct on the part of respondents. However, even the testimony of General Counsel's witnesses indicated that the statements were more in the nature of argumentative retorts to rebut claimed benefits to be obtained from union representation. In view of the importance given to the alleged threat to close the school, we turn to a more detailed examination of the record testimony regarding this alleged violation.

(i) *The meeting with Farrel on December 3, 1974*

After Sr. Denis had made her views clear that she opposed the union and would do "everything within the law to prevent" the union, she made a comment about the possible closing of the school. The three participants each had a different recollection of what was said. The relevant testimony was as follows:

Farrel (General Counsel's witness, direct examination):

> "I am not quoting verbatim, but, she said something like what do you expect to get from this outside organization and I said that I wanted job security and Sister said, there could be no job security because if the outside organization came into the school, the school would close and I said I wanted a tenure system and she went on to talk about dedication to the job and that we should be teaching for Christ and if I wanted more money I should go elsewhere."

Farrel further testified that during the conversation Sr. Denis also stated that 'several high schools had closed since —I think the number was four, four Diocesan high schools had closed since the Union was put into the high School'" (A. 8, 9).

Sr. Denis (Respondent's witness, cross-examination):

> "Mr. Farrel mentioned a few things, and he came out with—he didn't say much during the whole thing, but he came out with three things, I believe.
> One was money, and I said something to the effect that if there were too many demands from an outside organization upon the school, and the school couldn't meet these demands, that possibly the school would have to close. Schools, I think" (A. 9).

Teacher Kathleen Dietsche (Respondent's witness, cross-examination):

> "Sister referred, I believe, to high schools, to Diocesan high schools that had been open, and some had closed" (A. 9, n. 8).

The Administrative Law Judge, in his summary of her testimony failed to note, that later in response to another question on cross-examination she stated that Sr. Denis

mentioned closing

> "Only if St. Leo's or any parish, if any parish couldn't afford to give more money, then they would have to close.
>
> I don't believe she mentioned that if an outside organization wanted more, or demanded more." (A. 227)

The Administrative Law Judge credited the testimony of Farrel.

(ii) *The Faculty Meeting on December 4, 1974*

On December 4, 1974 a regular faculty meeting was held. At the conclusion of the meeting Sr. Denis repeated much of what she had discussed with Farrel on the preceding day. Every one present at the meeting testified, and the Administrative Law Judge found a conflict in the testimony as to what, if anything, was said about the possible closing of the school.

On one hand he noted that Dennis Farrel and Annette DiRocco testified that at this meeting Sr. Denis stated that "if job security was what the teachers wanted, if the outside organization was brought into the school, the school would not be able to meet the demands of the outside organization and the school would close." (A. 10)

On the other hand others had testified that no threat of closing the school was made by Sr. Denis or that if there was mention of the closing of the school it was in the context of a conditioned statement, namely, that if the union made demands that were unreasonable, the parish might not be able to satisfy the demand and might be forced to close. The testimony of these witnesses was as follows:

Kathleen Dietsche:

> "I believe Sr. Denis said something to the extent that if more money were asked by an outside organization,

and parishes couldn't meet it, schools would be forced to close (I don't know if Sr. Denis was referring to St. Leo's School or other Catholic Schools in general)" (A. 223).

Barbara Matos:

"Q. Isn't it true that what you told the Board at that time was 'She,' I assume Sister Denis, said, 'If the outside organization came in and made demands the school could not afford the school would close.'"

If it made demands?

A. Yes.

Q. Not automatically just because it made demands but only *if* the demands were such that the school could not afford them? A. Right." (A. 116)

Diana Mugno:

"Q. Do you recall if you heard the comment with regard to anything about closing? A. No, I did not." (A. 118)

Katherine Soldt:

"Q. Did Sister say anything about the closing of St. Leo's? A. No, sir.

Q. Did she say that if the union got in St. Leo's would be closed? A. No.

Q. Did she say that if the employees engaged in union activities the school, St. Leo's school would be closed? A. No." (A. 147)

Jeanne Van Valen:

"Q. Did she say anything about closing the schools, rather, St. Leo's School if the union got in? A. No.

Q. Did she say anything about closing the school under any circumstances? A. No." (A. 165)

Doris Campo:

> "Q. Did Sister at any time make any reference about closing St. Leo's if the union came in? A.No.
> Q. Did she make any reference about closing St. Leo's under any circumstances? A. No." (A. 170; T. 310—appendix in error)

Vita Zanneti:

> "Q. Did Sister say anything about the closing of St. Leo's School? A. No, she didn't." (A. 216)

Mary Glascock:

Although called as a witness by the General Counsel to testify that she had signed a union authorization form, Miss Glascock was—significantly—not asked any questions about the meeting of December 4th, although she had been employed since September of 1974. Presumably Miss Glascock was spoken to by Board agents in their investigation of the case but was not able to provide testimony helpful to the General Counsel.

As with respect to the meeting on the prior day, Farrel's testimony was credited, together with Di Rocco's. Yet their testimony of what was said could hardly be considered coercive. Mention of the closing was made in the context of the inability of the school to meet the demands of the union, which might force the School to close. This was coupled to the completely factual statement that, of the nine Diocesan high schools represented by Local 1261, four had been forced to close because of severe economic situations faced by all Catholic parochial schools

Petitioner implies that any mention of a possible closing of a business is violative of the Act. On the contrary, in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court upheld the right of an employer to express his opinion and to predict unfavorable consequences which he believes may result from union representation. Such

predictions or opinions will not be held to violate the Act if they have some reasonable basis in fact and are in the nature of predictions and opinions and not veiled threats of employer retaliation. The court stated:

> "Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probably consequences beyond his control . . ." (*Id.* at 618).

The comment of Sr. Denis falls squarely within the permissible limits of free speech as enumerated by the Supreme Court in *Gissel*. At the meeting with Farrel the remarks about closing were made in response to Farrel's statement of the benefits to be obtained from unionization. Similarly, even General Counsel's witnesses admitted that at the faculty meeting the reference to "closing" was conditioned upon the likely inability of the school to meet the union's demands with the consequent result flowing therefrom.

It was moreover a reasonable, factual prediction of what Sr. Denis thought might happen. The only schools in the Brooklyn Diocese that had been organized by the union were nine Diocesan high schools. Four had been forced to close after such representation, resulting from the serious financial condition of the parochial schools. To Sr. Denis, it followed that a similar result might occur at St. Leo's and representation by a union could not by itself guarantee the teacher his job. Indeed, if union demands were unreasonable, the union might have a very adverse effect on job security. Thus, Sr. Denis' comment was not a threat of

reprisal if unionization occurred but a prediction as to the effect she believed unionization could have if union demands were, in fact, unreasonable. That prediction was made "on the basis of objective fact", i.e. the actual closing of four Diocesan high schools, "to convey an employer's belief as to demonstrably probable consequences beyond [her] control . . ." (*Gissel, supra*).

In a variety of situations in which remarks of a similar type were made, the Board has held the statements to be legitimate comment within the *Gissel* guidelines. Thus in *Eastside Shopper Inc.*, 204 NLRB 841, the employer had stated

> "if a union got in and made unnecessary wage demands . . . management would be forced to reduce the departments even more than they really were and that, if a union came in, it would mean unreasonable demands made on the Company which might necessitate the cutting of certain department personnel (Id. at 844).

The Administrative Law Judge held these statements amounted to implied threats of job loss. The Board reversed, holding they were a lawful exercise of free speech since

> "The statements were made in the context of describing the Company's poor financial condition and were predicated upon what might happen if 'unnecessary wage demands' or 'unreasonable demands' were made by the Union on the Company (Id. at 841).

Accord: *Federal Paper Board Co., Inc.*, 206 NLRB 681 (Comment was "legitimate campaign dialogue"); *Press Specialties Manufacturing Co.*, 220 NLRB No. 65, 90 LRRM 1384 (statement by president of small company that he could not pay union wages and would instead close if the employees selected the union to represent them held not violative of the Act); *Tweel Importing Co.*, 219 NLRB

No. 130, 90 LRRM 1047 (not an unlawful threat to state that if the union demands were met respondent would have to go out of business because it could not pay the wages and benefits demanded and still make a profit).

Petitioner urges that the statements here are not predictions based upon available facts. Yet there was nothing in the nature of Sr. Denis' remarks which went beyond that permitted by *Gissel*. Her comments were substantially similar to those in *Press Specialties*, *supra*, where the Board recognized that where a small and intimate company is involved the employer may make statements concerning the possible effects of a union which would not be permissible in other situations. Here, too, the employer is small and like most parochial schools was in a precarious financial condition. After union representation in the Catholic high schools a number were forced to close. Thus as Sr. Denis commented, union representation could hardly guarantee job security, and its unreasonable demands might lead to the very opposite result.

Based upon all these factors it is submitted that the record as a whole leads one to conclude that the statements by Sr. Denis were a reasonable prediction based on available facts. They were not a threat of retaliation based on misrepresentation. Instead they constituted the legal exercise of the employer's rights under Section 8(c).

POINT III

No Basis Exists For The Bargaining Order Since A Fair Election Is Possible.

Assuming *arguendo* that 8(a)(1) violations were committed by respondents, none justify issuance of a bargaining order. As required by *Gissel*, a bargaining order is to be issued only where the unfair labor practices "tend to undermine the union majority and make a fair election an likely possibility". Thus the finding of 8(a)(1) violations

does not automatically lead to a bargaining order. In a recent decision, *Walgreen Co.*, 221 NLRB No. 181, 91 LRRM 1177, the Board in refusing to issue a bargaining order, stated:

> "We do not discern a pattern of pervasive and egregious unfair labor practices which cannot be remedied by traditional means, nor can we say that on balance the cards better reflect the employees' desires than would be a Board-conducted election" (91 LRRM at 1178).

The Courts similarly have eschewed any automatic rubber-stamping of bargaining orders where non-coercive violations occurred. Unless the unfair labor practices rise "to the level of imminent or future threat to the process of collective bargaining", a bargaining order will not be enforced. *Shulman, Inc.* v. *N.L.R.B.*, 519 F.2d 498 (4th Cir. 1975). Accord: *N.L.R.B.* v. *Graber Supermarkets, Inc.*, 501 F.2d 697 (7th Cir. 1974); *N.L.R.B.* v. *Gibson Products Co.*, 494 F.2d 762 (5th Cir. 1974).

The violations here were isolated, not part of any concerted plan and made little impact upon the employees. The opinion below is devoid of any analysis of the alleged violation in the particular circumstances in which they may have occurred. Instead it is another example of "a litany, reciting conclusions by rote without factual explication" *N.L.R.B.* v. *American Cable Systems, Inc.*, 427 F.2d 449 (5th Cir., 1970). This circuit, too, has found fault with the Board's mechanical application of the *Gissel* tests. In the two *General Stencils* cases, 438 F.2d 894 and 472 F.2d 170, this Court refused to enforce bargaining orders since there had been no explanation as to why the illegal conduct had made a fair election impossible so as to justify a bargaining order.

In the instant case, the 8(a)(1) violations found were the remarks about the possibility of closing the school and a threat to the leading union adherent that he would be

hurting his chances for advancement.[5] The violations were held to be within the second category of cases in *Gissel*, namely, of "less extraordinary cases marked by less pervasive practices which still have the tendency to undermine majority strength and impede the election progress". As we shall show neither violation warrants a bargaining order in the circumstances of this case.

The alleged threat to the leading union adherent (the making of which rests solely upon his testimony) was made in a private conversation on December 3, 1974. There is not an iota of proof that it was disseminated to other employees. Absent such proof, it defies explanation as to why that one remark would preclude the holding of a fair election (See, *N.L.R.B.* v. *General Stencils, Inc.*, 472 F.2d at 172-173). Thus this violation, even if it occurred, would not justify the bargaining order issued.

Neither does the second alleged violation relating to the possible closing of the school. Contrary to the position implicit in the opinion below and Petitioner's brief, this Court has rejected the contention that any statement related to a closing is so coercive that, without more, it will suffice as a grounds for a bargaining order. Thus in *N.L.R.B.* v. *World Carpets of New York, Inc.*, 463 F.2d 57 (2d Cir. 1972), a bargaining order premised upon a plant closing remark by the employer was denied enforcement since the Board's opinion was devoid of any analysis as to why, "in this particular case, a fair election was no longer possible" (*Id.* at 62).

Again, in *General Stencil II*, 472 F.2d 170 (2d Cir. 1972), after the case had been remanded to the Board to explain the rationale for a bargaining order, the Court again refused to enforce such order. There the general manager had allegedly stated to one employee that if the union came in "he would close down or might close down". The

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[5] The unlawful interrogation was not urged as a ground for the bargaining order.

Board held upon remand (as the Administrative Law Judge quoted in this case):

> "The employer's conduct—in particular, the threats of plant closure, layoff, and discharge—is of such gravity as to render a reliable election unlikely, even if the Employer were to discontinue his unlawful conduct" (195 NLRB at 1109).

This Court disagreed holding that there were circumstances invalidating that conclusion. First it noted that to consider the isolated statement relied upon to be similar to the repeated and detailed threats of plant closure which were the subject of the Court's rulings in *Sinclair Co.* v. *NLRB*, decided with *Gissel*, 395 U.S. at 618-619, 89 S.Ct. 1918, is an example of the "fallacy of the lonely fact" and the further fallacy of using the same word to cover wholly unlike situations. The Supreme Court had detailed at great length the extent, reality, and immediacy of Sinclair's threats of plant closing (472 F.2d at 173). It is those types of threats that justify a bargaining order. Second, the remarks, even if made, went little beyond the truism that an employer can shut a plant at any time. In fact the employees also "know how unlikely it is that a small local employer will in fact close down a flourishing operation simply in a fit of pique" (*Ibid.*). For these reasons the Court declined to enforce the order since there had been no showing that the illegal conduct had impaired the prospects for a fair election.

That reasoning applies here as well. The instant case involves a similar situation where the employer made the alleged coercive remarks orally and in the period of less than 24 hours. The remarks were never thereafter repeated. There was no impact upon the employees since a majority of those present denied even hearing that there was a threat of closing. Others indicated that the closing was conditioned upon the inability of the school to meet the union's demands.

The rights of the employees to determine this crucial issue should not be set aside as a result of the spontaneous remarks of Sr. Denis, a principal concerned with the welfare of her school and not trained in the nuances of labor relations. Here no one was discharged, no benefits were lost. Nor were anyone made to understand that reprisals would follow a favorable vote for the union. Instead we have a case where the union, recognizing that its "majority status" had no basis in fact and would dissipate when the election was held, seized upon innocent remarks of Sr. Denis to avoid the election. In view of the minimal nature of the violations the bargaining order is not warranted.

CONCLUSION

For all the reasons set forth, the Petition should be denied and the complaint dismissed.

Dated: New York, New York, May 18, 1976.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. ROMAN CATHOLIC DIOCESE OF BROOKLYN AND ST. LEO'S PARISH, AS JOINT OPERATORS OF ST. LEO'S SCHOOL, Respondents.	)	No. 76-4021

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Brief of Respondents in the above-entitled case were served by mail upon Elliott Moore, Esq., Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C. 20570 this 18th day of May, 1976.

Fred Adams